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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 677

THE CITY OF SEATTLE, et al., *Appellants*

and

THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR KING COUNTY, THE HONORABLE W. R. COLE, JUDGE, *Appellant*

v.

ROBERT R. BEEZER, *Appellee*

and

PUBLIC UTILITY DISTRICT NO. 1 OF PEND OREILLE COUNTY, WASHINGTON, *Intervenor-Appellee*

On Appeal From the Supreme Court of the State of Washington

OPPOSITION TO MOTIONS TO DISMISS APPEAL

The PUD and Beezer seek to obscure the purpose of Seattle's appeal to this Court, namely to obtain enforcement of the judgment by the Court of Appeals in *PUD v. FPC*, 308 F. 2d 318 (D. C. Cir. 1962), made final by this Court's threefold denial of the PUD's petitions for

review,[1] so that the City may proceed with the construction of its Boundary project licensed by FPC on July 10, 1961. The action of the Washington Supreme Court commanding continuing relitigation in the state courts of the matters determined by the federal judgment not only refuses to recognize the validity of that judgment or the exclusive federal jurisdiction in the matter, but halts the licensed project through foreclosing the sale of bonds. The PUD's elaborate motion to dismiss this appeal and the token motion by Beezer are designed to enmesh the project in endless litigation.[2] For the reasons to follow, the objections to the appeal are without merit.

1. APPEAL IS THE PROPER PROCEDURE FOR REVIEW.

There can be no question that the crux of the litigation below in the Washington courts was the identical supersedure issue presented by the PUD to the Court of Appeals for the District of Columbia Circuit, namely, whether RCW 35.84.030 overrides section 21 of the Federal Power Act.[3] Nor is there any doubt that

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[1] Certiorari denied, 372 U.S. 908, rehearing denied, 372 U.S. 956, motion for leave to file second petition for rehearing denied, 375 U.S. 871. (J.S., Appendix B)

[2] The PUD and Beezer are now appealing the trial court's decision for the purpose, *inter alia*, of seeking a new trial.

[3] The Court of Appeals stated the issue thusly:

> ". . . Strictly speaking, the question is not whether Seattle has complied or can comply with the state eminent domain statute, *but rather whether the limiting provision of that statute prevents Seattle from exercising the right of condemnation conferred on it by Section 21 of the Federal Power Act. That is to say, once Seattle has become a federal licensee, does the prohibitory provision of the state condemnation statute disable it from going forward with its federally-licensed project by preventing it from condemning under Section 21 of the Federal Power Act the land necessary for its purposes?*" (J.S., Appendix B-6, emphasis supplied)

the Washington court decided this issue in favor of the state statute. When the trial court granted Seattle's motion for summary judgment (R. 0042), which motion had been brought to test this very issue as well as the collateral attack issue, both Beezer and the PUD filed notices of appeal to the Supreme Court of Washington which included in identical terms:

> "5. The trial court erred in holding that the Federal Power Act and particularly § 21 thereof, . . . superseded . . . RCW 35.84.030 . . .
>
> "6. The trial court erred in failing to hold that if § 21 of the Federal Power Act . . . was intended by Congress to supersede RCW 35.84.030, said § 21 is invalid and repugnant to the Constitution of the United States and the Tenth Amendment thereto, . . ." (R. 0045-46; 0049-50).

The decision of the Court of Appeals, later presented to the Washington Supreme Court, held directly against Beezer and the PUD on this subject. Despite this, and despite the finality which attached to the judgment of the Court of Appeals when this Court denied certiorari, the Washington Supreme Court, in the 5-4 judgment we here appeal to this Court, declared itself "so completely convinced that we are right . . . that we are unwilling . . . to accept the opinion of the United States Court of Appeals as decisive . . ." (J. S., Appendix A-3)

The PUD's motion here concedes that the validity of RCW 35.84.030 was upheld below:

> "In the course of reviewing the issuance of Seattle's license, the District of Columbia Circuit concluded that, because of Section 21 of the Federal Power Act, Seattle would obtain a right to

> defy the state statutory restriction on its charter. In the present taxpayer's suit, on the other hand, *the Washington Supreme Court concluded that no such right would be conferred on Seattle* if the state statutory restriction is found to cover the PUD properties. . . ." (PUD Motion, p. 21, emphasis supplied)

Since the Washington Supreme Court has sustained the validity of RCW 35.84.030 as against Seattle's claim, confirmed by the Court of Appeals, that section 21 controls, the case for appeal is established. In *Charleston Assn.* v. *Alderson,* 324 U.S. 182, 185-186 (1945) this Court stated:

> "Where it appears from the opinion of the state court of last resort that a state statute was drawn in question, as repugnant to the Constitution [or laws of the United States], and that the decision of the court was in favor of its validity, we have jurisdiction on appeal. For we need not inquire how and when the question of the validity of the statute was raised when such question appears to have been actually considered and decided by that court. . . ."

And the Court has uniformly sustained its appellate jurisdiction under 28 U.S.C. § 1257(2) where the validity of a state statute has been sustained as against a claim of overriding federal law. *Metlakatla Indian Community* v. *Egan,* 363 U.S. 555, 561 (1960); *Reconstruction Finance Corp.* v. *Beaver County,* 328 U.S. 204, 206-207 (1946).

2. THE JUDGMENT BELOW MEETS THE COURT'S ESTABLISHED TESTS OF FINALITY UNDER 28 U.S.C. § 1257.

A. The PUD's effort to distinguish Curry and Langdeau is faulty.

Contrary to the PUD's analysis of *Local 438* v. *Curry*, 371 U.S. 542, this Court there held the judgment below final under 28 U.S.C. § 1257, without waiting for the results of further trial court proceedings on the ground that the Georgia Supreme Court had finally determined that the state courts had jurisdiction in a labor dispute within the exclusive jurisdiction of the NLRB. Similarly, the Washington Supreme Court has finally decided that the state courts have jurisdiction irrespective of the exclusive review proceedings provided by § 313(b) of the Federal Power Act and the holding of the Court of Appeals in those proceedings that section 21 supersedes RCW 35.84.030. The "federal right" of the union in *Curry* to have the controversy adjudicated by the NLRB rather than the state courts was precisely the same type of "federal right" that Seattle seeks to enforce here.

The PUD's attempt to limit *Curry* to cases involving temporary injunctions in labor disputes conflicts with this Court's companion decision in *Mercantile National Bank* v. *Langdeau*, 371 U.S. 555 (1963). In *Langdeau* as well as in *Curry*, the judgments appealed immediately deprived the appellants of their right afforded by a federal statute not to have to undergo certain state court proceedings. The PUD, while recognizing this (PUD Motion, pp. 10-11), seeks to argue that "the Federal Power Act does not grant to licensees an immunity from suits under state law . . ." (Motion, p. 10). On the issue involved here, however, this Court's *Tacoma* decision (357 U.S. 320) holds directly

to the contrary through its ruling that under § 313(b) an issue indistinguishable from that posed in the *Beezer* litigation below[4] is within the exclusive jurisdiction of the federal review proceedings.

If FPC licensees may be successfully subjected to relitigation in the state courts of issues within the exclusive jurisdiction of the federal review proceedings, then no licensed project can be properly undertaken until the state proceedings are terminated, regardless of the number of years this might require. The pendency of the state court proceedings forced Seattle to finance initial phases of project construction out of treasury funds now about exhausted. Further construction is dependent upon the sale of bonds, which is impossible with *Beezer* unresolved. The halting of construction of the Boundary Project not only vetoes the federally prescribed timetable for the project set by the Federal Power Commission, but will cause irreparable loss to the City of millions of dollars through disruption of its coordinated construction schedules,[5] not to mention the irretrievable loss of project power urgently required by the City's consumers.

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[4] I.e., the effect of a state law limitation on the federal powers of condemnation conferred by section 21 on licensees.

[5] For instance, if the next phase of construction work requiring bond financing cannot proceed, it will require the release of several hundred employees already hired.

B. The mandamus and prohibition cases cannot be distinguished.

The PUD seeks to distinguish this Court's long line of cases according finality under 28 U.S.C. § 1257 to mandamus and prohibition actions, by characterizing the mandamus action below as one merely to enforce the prior mandate of the Washington Supreme Court. The PUD argues that if prior decisions were incurred in the state courts to which a mandamus action relates, the mandamus is not "distinct and independent from the main proceeding." (PUD Motion, p. 12.) This argument fails for at least three reasons.

First, the distinction is irrelevant. This Court has upheld the finality of a state court judgment in a mandamus proceeding where the purpose of the mandamus was to require compliance with a prior order by a state commission, *Detroit and Mackinac Railway Co.* v. *Michigan Railroad Comm'n.*, 240 U.S. 564, 570-71 (1916). And in *Pan American Petroleum Corp.* v. *Superior Court*, 366 U.S. 656, 661 (1961), a unanimous Court, speaking through Mr. Justice Frankfurter, upheld its jurisdiction over a judgment by the Supreme Court of Delaware in a prohibition action which had only been initiated by defendants in that court after their motions for summary judgment in a lower Delaware court had been denied. In fact, in none of this Court's decisions recognizing the finality of mandamus or prohibition actions has this Court ever deemed it important to determine the precise stage of the uncompleted state court proceedings or the point therein at which the mandamus action was brought. The PUD's argument which would seek to distinguish between mandamus actions on this basis is contrary to precedent.

Second, the crux of this Court's test for holding mandamus and prohibition actions final, namely, the limited purpose of such writs to keep inferior courts within their jurisdiction,[6] is clearly applicable to the mandamus proceeding below, even assuming arguendo that the purpose of the mandamus was to enforce a prior order of the Washington Supreme Court. It is clear beyond doubt, and the PUD does not deny, that the sole ultimate purpose of the mandamus action below was to require the Washington Supreme Court to assume jurisdiction over the Beezer and PUD complaints and proceed to trial. Since this is precisely within the long standing traditional scope of mandamus actions recognized as final by this Court, it is immaterial whether the mandamus also had the effect of seeking to enforce a prior order.

Third, the PUD inaccurately describes the record in seeking to characterize the mandamus action below as simply to require the trial judge to do what he had already been told to do in the Washington Supreme Court's decision of July 12, 1962. That decision, while holding that RCW 35.84.030 controlled Seattle, recognized that the state courts would lack jurisdiction to proceed if the federal courts finally held to the contrary:

> "Whether the Federal Power Commission can confer powers of condemnation on cities which the state legislature has, as a matter of policy, expressly prohibited, the federal courts must determine." (J. S., p. C-4.)

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[6] See e.g. *Pan American Petroleum Corp.* v. *Superior Court*, 366 U.S. 656, 657-81; *Mt. Vernon-Woodberry Cotton Duck Co.* v. *Alabama Interstate Power Company*, 240 U.S. 30 (1916).

And in its decision of October 2, 1962, after the Court of Appeals decision was first presented to it, the Washington Supreme Court certainly made it appear clear that finality of the further proceedings pending in the federal arena would conclude the controversy:

> "We are advised that Public Utility District No. 1 of Pend Oreille County will petition the Supreme Court of the United States to review, by certiorari, the circuit court's affirmance of the order of the Federal Power Commission; and, *pending such review*, we do not accept the conclusions of the circuit court as res judicata of the issues heretofore determined by this court in its opinion of August 3, [sic] 1962. Nor do the conclusions of the circuit court render moot the issues presented to us for determination, *unless, and until*, the judgment of the circuit court becomes final and binding on Public Utility District No. 1 of Pend Oreille County, Washington." (J.S., p. D-2; emphasis supplied.)

The finality referred to attached upon denial of the PUD's petition for certiorari by this Court. Although the Beezer suit had by then returned to the trial court, by consent no action was being taken pending the action of this Court (R. 0080). The trial court, pursuant to the prior Washington Supreme Court decisions, could do nothing but conclude that the finality of the judgment of the Court of Appeals upon the PUD deprived the state courts of jurisdiction. That this is so was conceded by the Washington Supreme Court in its opinion below:

> "We understand the reluctance of the Superior Court of King County to proceed, as we have directed, because of an intervening decision of the United States Court of Appeals for the District of Columbia in *Public Util. Dist. No. 1 of Pend*

Oréille County v. *Federal Power Comm.* (August 30, 1962), 308 F.(2d) 318, cert. denied, 372 U.S. 908 (1963), 9 L. Ed. (2d) 716, 83 S. Ct. 719, petition for rehearing denied, 372 U.S. 956, 9 L. Ed. (2d) 980, 83 S. Ct. 950. This reluctance is doubtless strengthened by the concessions of counsel in their briefs in a recent motion to dismiss an appeal, *and our own statements in the opinion denying the motion to dismiss* (*Beezer* v. *Seattle* (Oct. 2, 1962), 60 Wn. (2d) 652, 375 P. (2d) 256)." J.S., p. A-3, emphasis supplied.)

Thus, it is fictitious for the PUD to now assert that the mandamus action was solely for the purpose of seeking compliance with the prior mandate of the Washington Supreme Court. Until its decision below the Washington Supreme Court had consistently recognized that the federal review proceedings, when final, would be conclusive of state court jurisdiction. By its 5-4 opinion below and its final mandate to Judge Cole to assume jurisdiction regardless of the final federal judgment of the Court of Appeals, the Washington court changed its mind. In so doing it created a direct conflict between the state and federal judgments, giving rise for the first time to the reviewing jurisdiction of this Court, now invoked by Seattle.

3. THE PUD IMPROPERLY SEEKS A STAY OF THIS COURT'S JURISDICTION.

The PUD's request that this Court stay its hand while *Beezer* continues (Motion, pp. 17-19) is misplaced. To begin with, abstention necessarily presumes that the state courts have jurisdiction to decide the issue for which abstention is sought. On the supersedure issue involved in our case, *Tacoma* holds the jurisdiction of the federal courts to be *exclusive*. Moreover, an identical suggestion by the PUD was rejected

twenty months ago by the Court of Appeals.[7] The finality of that court's judgment upon denial of certiorari by this Court should bar the PUD from reasserting the matter now. But even if the PUD is not barred as a matter of procedure, this Court has very recently made it clear that the abstention doctrine does not mean that a party who has fully and freely litigated his rights in one system of courts should be permitted to do so all over again in another system. *England* v. *Louisiana State Board of Medical Exms.*, 32 U.S. Law Week 4093 (Jan. 13, 1964). The PUD, having fully and unreservedly litigated the issues in the federal proceedings, has had its day in court.

4. THE LITIGATION BELOW, NOT OUR APPEAL, IS MOOT.

The PUD alone argues (Motion pp. 19-20) that the completion of the trial by the lower Washington court renders this appeal moot.[8] The obvious fallacy in this is that the end of the trial does not mean the end of the state court proceedings. Both the PUD and Beezer have appealed the trial court's decision (see PUD Motion, p. 18; Beezer Motion, p. 2) and both filed motions for new trials.[9] As long as the PUD and Beezer may continue to relitigate Seattle's rights under its Court of Appeals judgment in the state courts at any level, Seattle is effectively barred from

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[7] See PUD's motion, p. 27, fn. 16.

[8] Beezer does not agree for he informs the Court in a note:

> "*While it has no bearing on the jurisdiction of this Court on appeal*, appellee Beezer herewith informs the Court as a fact that the cause below was tried in the trial Court in November, 1963; . . ." (Beezer Mo., p. 2; emphasis supplied.)

[9] These motions were denied by the trial court but are the subject of appeal.

selling bonds necessary for project construction. The continued proceedings in the state courts authorized by the decision below thus directly affect the rights of the litigants and make this a living and not a hypothetical controversy. Obviously this appeal is not moot. *Newport News Shipbuilding and Drydock Co.* v. *Shauffler*, 303 U.S. 54, 58 (1938); *Collins* v. *Porter*, 328 U.S. 47 (1946).

Actually it is not Seattle's appeal, but the decision below that is moot. As the four dissenting judges below properly recognized, the decision we are here appealing was mooted upon this Court's denial of the PUD's petition for certiorari to the Court of Appeals.[10] *Cf. Alton* v. *Alton*, 347 U.S. 610 (1954). The refusal of the Washington court to so rule poses a federal issue upon which this Court is the ultimate judge. *N. L. Liner* v. *Jafco, Inc.*, U.S. , 11 L. ed. 2d 347, 350 (Jan. 6, 1964). Accordingly, the judgment below should be vacated and the cause remanded. *Cf. Dyer* v. *City Council of Beloit*, 333 U.S. 825 (1948).

[10] "That judgment [of the Court of Appeals in *PUD* v. *FPC*] is now final and binding on the PUD, and the original issues before us have become moot, but the majority refuses to accept the decision of the only court that has jurisdiction to decide these issues unless and until the United States Supreme Court reviews that decision. Since that court has refused to review the decision of the court of appeals, I see no escape from the conclusion that the litigation is now ended." (J.S. Appendix A-10.)

5. THE QUESTIONS ARE SUBSTANTIAL.

A. The judgment below permitting a collateral attack in the state courts on the federal licensing proceedings obviously presents a substantial federal question.

There can be no serious question after this Court's decision in *Tacoma* v. *Taxpayers*, 357 U.S. 320 (1958) that the mandamus decision of the Washington Supreme Court below finally upholding state court jurisdiction to litigate matter determined in the federal proceedings prescribed by Congress for the issuance of licenses, raises a substantial federal question. As Mr. Justice Harlan stated in his concurrence in *Tacoma*:

> "... The Court of Appeals in the earlier proceeding had jurisdiction to determine whether state or federal law governed Tacoma's power to condemn the State's hatchery, and that issue itself was a federal question. Section 313(b) of the Federal Power Act therefore foreclosed relitigation of this issue in the present case. ..." (357 U.S. at 341-342.)

Indeed it is the very ordering of further state court proceedings by the court below in defiance of section 313(b), the *Tacoma* decision, and the final judgment of the District of Columbia Court of Appeals, that poses the substantial federal issues now ripe for review under 28 U.S.C. § 1257 pursuant to the precedents of this Court (see *supra*, pp. 5-10; Gov. Memorandum, pp. 10-13).

B. Beezer is bound, like the PUD, and may not collaterally attack the direct review proceedings.

In a further effort to demonstrate that the issues of collateral attack and supersedure raised by the decision below are not substantial, the PUD tries to distinguish *Tacoma*, mainly on the ground that it does

not apply here because Beezer was not a party to the federal proceedings.

The short answer to this is that *Tacoma* holds that Congress vested the federal proceedings under section 313(b) with exclusive jurisdiction:

> ". . . Hence, upon judicial review of the Commission's order, all objections to the order, to the license it directs to be issued, and to the legal competence of the licensee to execute its terms, must be made in the Court of Appeals or not at all. For Congress, acting within its powers, has declared that the Court of Appeals shall have 'exclusive jurisdiction' to review such orders, and that its judgment 'shall be final' subject to review by this Court upon certiorari or certification. Such statutory finality need not be labeled res judicata, estoppel, collateral estoppel, waiver or the like either by Congress or the courts." (357 U. S. at 336-337)

Harris v. *Central Nebraska Public Power & Irrigation Dist.*, 29 F. Supp. 425 (D.C. Neb. 1938) is directly in point on this issue, holding that a person who had not participated in the federal license proceedings could not thereafter collaterally attack the licensee's power to condemn under section 21. After reviewing the notice requirements and citing the review opportunities available under section 313 of the Federal Power Act, the court said (at 428):

> ". . . Such proceedings were disregarded by the land owner in this case. We think they had an opportunity to be heard on the issue which they now raise, but of which they did not avail themselves."

This applies squarely to Beezer. If he is indeed a "stranger" to the licensing proceedings and direct re-

view thereof before the Commission, the D.C. Circuit and this Court which covered the period 1953 to 1963, as the PUD would have us believe (Motion, p. 24), then it is because he failed to avail himself of the ample opportunity to be heard, and may not now complain.

But in the federal scheme of things Beezer is not a stranger in any sense. As this Court held in *First Iowa Hydro-Elec. Coop.* v. *FPC*, 328 U.S. 152, 181 (1946), with reference to the "detailed provisions of the Act providing for the federal plan of regulation [which] leave no room or need for conflicting state controls," including section 21:

> "It is the Federal Power Commission rather than the Iowa Executive Council that under our constitutional Government must pass upon these issues on behalf of the people of Iowa as well as on behalf of all others." (328 U.S. at 182).

And Mr. Justice Frankfurter, who dissented, nevertheless pointed out in particular the notice provisions which must be given states, and said:

> ". . . If a State does not challenge the claim of an applicant, the evidence submitted by the applicant, if found to be satisfactory by the Commission, has met the demands of § 9(b), and *a State cannot thereafter challenge the Commission's determination. . . .*" (328 U.S. at 184-85, emphasis supplied)

If a state would be thus foreclosed from pursuing a matter it had failed to raise before the FPC, then certainly a citizen of the state is likewise foreclosed from making the sort of challenge Beezer does here.

C. The Washington court has upheld the validity of RCW 35.84.030, regardless of its repugnancy to section 21 of the Federal Power Act.

The PUD concedes that the supersedure question is in the controversy. It is a federal question of "great importance" (Motion, p. 31) and might be grounds for a petition for certiorari (Motion, p. 11). But as of the moment, the PUD says ". . . this federal question is premature at this time." (Motion, p. 31.) The claimed prematurity is argued as a matter of convenience only. The fact that the Washington Supreme Court has already decided the question is so inescapable that even the PUD finds it impossible to keep from adverting to this fact.

Two examples will suffice. At page 21 of its motion, the PUD says:

> ". . . In the present taxpayer's suit . . . the Washington Supreme Court *concluded* that no such right [condemnation under section 21] would be conferred on Seattle . . ."

And at page 31, at the very point that the PUD contends for lack of finality in the judgment below because of prematurity, the PUD says:

> "We turn to the last question discussed by Seattle . . . [supersedure]—*the question on which the Washington Supreme Court has expressed its total disagreement with the District of Columbia Circuit. . . .*" (emphasis supplied in both quotes)

CONCLUSION

For the reasons set forth in the Jurisdictional Statement, the Government's memorandum *amicus*, and this opposition to the motions to dismiss, it is prayed that this Court grant the appeal and summarily reverse the Court below or vacate its judgment as moot.

Respectfully submitted,

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